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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

79-10

No. A-1026

THE UNIVERSITY OF TENNESSEE, et al.
Petitioners

v.

RITA SANDERS GEIER, et al.
Respondents

On Application for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE

University of Tennessee at Nashville
Chapter of American Association
of University Professors (UT-N AAUP)

* * * * *

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BRIEF OF THE UT-N CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,

AMICUS CURIAE

The University of Tennessee at Nashville Chapter of the American Association of University Professors appears amicus curiae upon motion to this Court.

Interest of Amicus Curiae

The interest of the UT-N Chapter of the American Association of University Professors (AAUP) as amicus curiae is set forth in the Chapter's motion for leave to file this brief amicus, to which motion this brief is annexed.

Summary of Argument

On January 31, 1977, the day the University of Tennessee at Nashville UT-N) was ordered merged with Tennessee State University (TSU) by the District Court, there existed in this country ten other cities like Nashville where similar Black/white public colleges were operated. These schools employed over nine thousand

faculty[1]. The decision here, especially the process by which merger was ordered and carried out, demands careful scrutiny because merger is likely to be used to achieve desegregation at these other schools. Accordingly, the UT-N AAUP Chapter will argue that this Court should consider educational assumptions as well as constitutional issues in deciding whether to grant the writ of certiorari in this case. These issues include:

1. Whether the decision to merge or the merger plan sets standards by which to monitor the success or failure of the merger remedy.
2. Whether there was appropriate faculty participation in the decision to merge.
3. Whether the merger plan provides adequate safeguards for affected faculty.

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[1] These schools enrolled over 170,000 students. See Appendix A for a comparative list of these schools. Besides colleges which exist in a side-by-side situation, there is a total of more than 100 racially-identifiable colleges which will be affected by the disposition of this case.

Amicus will ask this Court to view the foregoing issues in light of the AAUP's Statements regarding faculty rights and the faculty's role in the desegregation process. Amicus concludes that this Court's sensitivity to educational issues impels granting the writ of certiorari in this case.

ARGUMENT

I. This Court should review this case and set standards by which faculty can monitor the success or failure of its efforts to desegregate Tennessee State University.

On the date UT-N was ordered merged with TSU, UTN's enrollment was 14.5% Black. Amicus contends this was adequate to meet the college's affirmative duty to desegregate because UT-N as a night school draws only commuting students most of whom are daytime employees or homemakers. These come from the Greater Nashville Metropolitan SMSA which is 16% Black.[1] The District Court disregarded this test of desegregation and applied

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[1] In 1975, the population of Tennessee was 15.6 percent Black. The Nashville-Davidson County percentage was 19.6;

an interactive theory of state action in which the state as a whole was seen as the responsible party. It concluded that the existence of UT-N was a constitutional violation because it fostered "competition" for students, limiting TSU's ability to desegregate.[2]

Regardless of how this Court treats the interactive theory, amicus urges this Court to establish standards which define a unitary system of higher education. With or without a merger, the faculty at UT-N will still have an affirmative duty to desegregate itself and/or successor institutions--but what is the measure of the duty? This Court has recently acknowledged the faculty's role in using

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but the revised 1975 Nashville SMSA (8 counties, including Davidson), based on 1970 population data was 16.3 percent. U.S. Bureau of the Census, Statistical Abstract of the United States,1978 (99th ed.) Washington, D.C, 1978, pp.25,33; 1970 Census of Population, pt.44 Tennessee, vol.1 Population, (Washington,1973) pp.101-104. The June,1979 graduating class was 26% Black.

2 Geier v. Blanton, 427 F. Supp. 660,661 (M.D.Tenn.1977).

race as a criteria in admitting applicants to professional schools. See, Regents of the University of California v. Bakke, ___U.S.___, 98 S.Ct. 2733, 57 L Ed 750 (June 28, 1978). Now this Court should specify what race percentage of undergraduate students (and faculty) at a given school or geographical area achieves racial equilibrium: that is, to identify at what point race is no longer an acceptable criterion upon which to deal with students and faculty. Absent such standards the affected faculty must continually grope for an undefined "unitary" system, never certain of their role in Black colleges.[3]

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3 Black administrators appear uncertain about what standards identify a unitary system. The Black president of TSU was asked to identify "effective desegregation" of Nashville higher education. His response:

A: Effective desegregation of this area to me does not mean UT-N going to eighty-twenty and TSU going to sixty-forty. The effective desegregation of the Nashville area means a single institution serving the population of this area.

Q: It doesn't just mean a single institution, it means TSU serving only this area?

The lack of identifiable standards is an acute problem in this case because the (unknown) standards applied to the Nashville situation differed radically from the (again unknown) standards applied statewide. In a companion appeal the Sixth Circuit Court of Appeals held that statewide desegregation was proceeding properly although only one other college had achieved UT-N's percentage of Blacks.[4] The paradox resulting from conflicting decisions of the Sixth Circuit seriously destabilizes important nationwide desegregation strategy announced in Adams v. Richardson, 480 F.2d 1159 (D.C. Cir 1973):

A: That's right.
Q: And it means TSU serving it with assurances of Black leadership, does it not?
A: In the short term, yes.

Testimony of Dr. Frederick S. Humphries in Geier v. University of Tennessee, Joint Appendix, Vol. VI, pp. 1415-1416.

[4] Richardson v. Blanton, case nos. 77-1622 and 77-1624, Sixth Circuit Ct. of Appeals, April 13, 1979. "It was felt that statewide desegregation would be achieved if each institution enrolled Black students in approximate proportion to the Black population of its service area." (slip. opinion, p.6)

"The problem of integrating higher education must be dealt with on a statewide rather than a school-by-school basis." (p. 1164).

The nationwide desegregation case, Adams v. Richardson, supra, expressly relied on the experience in the instant case in fashioning state-wide rather than school-by-school remedies. See, HEW, Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education in Haynes, A Critical Examination of the Adams Case: A Source Book (Washington: Institute for Services to Education, 1978), at p. k-7 to k-8. Moreover, the presidents of the affected Black colleges, in an amicus brief in Adams argued against the merger remedy ordered herein. They argued vehemently on educational grounds against the view that

> "... the maintenance of the Black Colleges and the larger University within a particular state is the maintenance of a dual system of education based upon race and therefore the state is discriminatory and engaging in conduct forbidden by the Fourteenth Amendment. It follows then, that the state must establish a unitary system--one system. To accomplish this,

> the Black institutions must be assimilated into the white unitary system where there is presumptively equal educational opportunity, independent of, and maybe contrary to, the state's wishes to establish and maintain a "special purpose" institution of Higher Education."[5]

Amicus in Adams, like amicus here, insists that the state has a legitimate interest in maintaining properly desegregated "special purpose" colleges. The University of Tennessee at Nashville, a night school, meets this definition. Amicus here also agrees with amicus in Adams that the free-choice nature of higher education requires different desegregation approaches and that Brown's progeny cannot be ipso facto applied to every level of education.[6] This Court is

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[5] Amicus brief of National Association for Equal Opportunity in Higher Education (Adams v. Richardson) in Haynes, A Critical Examination of the Adams Case: A Source Book (Washington: Institute for Services to Education, 1978) p. c-22 to c-23.

[6] Id. at p. c-21 to c-23.

in apparent agreement. Cf. Alabama State Teachers Association (ASTA) v. Alabama Public School and College Authority, 289 F. Supp. 784 (M.D. Ala. 1968), affd. per curiam 393 U.S. 400 (1969). And the District Court in the instant case took this position in 1972, only to abandon it in 1977. Geier v. Dunn, 337 F. Supp. 572, 579 (M.D. Tenn. 1972).

The lack of comprehensible institutional or statewide standards seriously impedes educational as well as desegregation planning. In the instant case UT-N faculty had asked the District Court to adopt a consolidation-type merger rather than an absorption. To amicus, consolidation seems the best way for UT-N to "support" TSU, a school which both plaintiffs[7] and the District Court characterized as a weak or deteriorating[8]

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[7] "The quality of instruction [at TSU] is basically substandard." Plaintiff's memorandum of criteria concerning Proposal for Disestablishment of Dual System of Higher Education in Tennessee. April 4, 1969 at p. 6.

[8] Sanders v. Ellington, 228 F. Supp. 937, 943 (M.D. Tenn. 1968).

institution. Now, without court-defined desegregation standards and court-imposed assurance that steps will be taken to enhance the "merged TSU," there is grave danger that the school will re-segregate and decline even more. Amicus asks this Court, in addition to considering desegregation standards, to consider steps to enhance academic programs akin to those ordered in Hunnicutt v. Burge, 356 F. Supp. 1227 (M.D. Ga. 1973). Cf. Milliken v. Bradley, 433 U.S. 267 (1977). Amicus earnestly asks this Court to grant the writ of certiorari and review this question, regardless of this Court's decision on the appropriateness of the merger remedy ordered herein.

As educators, we look with dismay at the legal conclusions drawn from faulty educational assumptions. To illustrate, the District Court cited the "successful" transfer of UT-N's graduate teacher education program to TSU as a predicate for full merger. Geier v. Blanton, 427 F. Supp. 644, 655, 656, (M.D. Tenn. 1977). In truth, the transfer was a dismal failure--only ten percent of the UT-N students attended TSU and only one of six

affected faculty members became employed there. See Smith, An Analysis of Enrollment Decisions Following Court Ordered Program Termination and Transfer (Ed.D. dissertation, University of Tennessee at Knoxville, June 1976).

Amicus earnestly calls upon this Court to weigh carefully the educational considerations as well as purely legal ones involved herein. To Amicus, as educators, mere desegregation is not enough. Our goal is equality of educational attainment: in short, effective desegregation.

Finally, the Black colleges[9] themselves

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[9] As used here "Black colleges" means public institutions. Generalizations about the nature and role of Black colleges ignore a wide diversity among such schools. For analysis of these differences, see Jencks and Riesman, The American Negro College, 37 Harvard Educational Review 3-60 (1967); Bowles and DeCosta, Between Two Worlds, A Profile of Negro Higher Education (New York: Carnegie Comm'n on Higher Education, 1971). According to this source (p.286) there are 34 public Black four-year colleges in the United States.

deserve to know what the Constitution requires of them. These schools' friends usually argue for enhancement without eliminating the Black predominance[10] while other voices (friendly or not) cite the schools' serious educational[11] and administrative[12] weaknesses and argue for closer cooperation with white institutions and

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10 The classic argument is made by Tollett, Black Institutions of Higher Learning: Inadvertent Victims or Necessary Sacrifices? 3 Black Law Journal 162-174 (1973). See also, Note, The Affirmative Duty to Desegregate State Systems of Higher Education Without Eliminating Racially Identifiable Schools, 5 North Carolina Central Law Review 365 (1974). Black colleges are not without Black critics. See Sowell, Black Education, Myths and Tragedies (New York: McKay, 1972), p. 251-265.

11 Golsan, Wasting Black Minds, 40 Progressive 29 (September 1976). Stringer, White Teacher, Black Campus, Change (November, 1974) 27. (Accounts of white teachers' frustrations in teaching at Black colleges).

12 Johnson, The Black College as a System, Daedalus (Summer, 1971) 798-812 (paternalistic administration). See also, Jones, Uncle Tom's Campus (New York: Praeger, 1973).

faculty[13]. Regardless of what remedy this Court orders, all knowledgeable observers agree that the time is ripe for decision. Kenneth Tollett, a leading Black educator writes, "Not since Sweatt has the Court spoken directly and explicitly to the status of predominantly Black public higher education institutions."[14] And Tollett has expressed concern that the Green doctrine might lead to the consolidation or merger and, thus, destruction of Black institutions.[15]

II. This Court should accept this case for review to consider whether there was appropriate UT-N faculty participation in the decision to merge UT-N with TSU.

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13 See Pettigre, The Role of Whites in the Black Colleges of the Future, 100 Daedalus 814 (Summer, 1971); Monroe, The Black College Dilemma 53 Educational Record 136 (Spring, 1972).

14 Tollett, supra note 10

15 Tollett, supra note 10. Administrators of Black colleges echo these fears. See, King V. Cheek, Jr. (President, Morgan State College) "The Philosophical Justification for Black Colleges in a Multiracial Society," Address, Concurrent General Session, 27th Annual Conference on Higher Education, American Ass'n for Higher Education, Chicago, March 6, 1972. ERIC Doc. ED 061 871.

The District Court ordered the defendants to draw up a plan merging UT-N and TSU. This Merger Plan was, in effect, approved by the District Court in 1977 when it refused to stay or hear objections to it. The Plan was confected by a six-person Committee of administrators which did not include participation by any UT-N faculty members except as observers. Earlier, no UT-N faculty members were called to the witness stand by any party during the month-long trial of this case.

The failure to allow faculty any input regarding the decision to merge or substantive input into the process of merger planning violates the letter and spirit of the AAUP's Statement on Government of Colleges and Universities which warns, "unilateral effort can lead to confusion or conflict" and states: "...major changes in ... the relative emphasis to be given to the various elements of the educational and research program should involve participation of governing board, administration, and faculty prior to final decision."[16] (Emphasis added).

[16] AAUP Policy Documents and Reports ("Redbook") 1977 Edition (Washington: AAUP, 1978), p.40.

In the present case the excluded faculty were predominantly white, but if the merger is allowed to stand it will set a precedent which will in most instances have the opposite result--Black colleges will be absorbed by white colleges.[17] A decent respect for the interests of all faculty members requires letting their voices be heard and this Supreme Court should consider the educational and personal concerns of the affected faculty as well as merely their race or the race of the students they serve.

Amicus is not asking this Court to grant certiorari simply to review evidence and discuss specific facts. United States v. Johnston, 268 U.S. 220, 227 (1925). Rather, amicus wants to bear witness that desegregation remedies have sometimes borne untoward results because they cut across the fabric of academic

[17] In the instant case the Black president of TSU favored a merger of UT-N under TSU control, but expressed concern that a series of junior college mergers in Florida had resulted in the Black colleges merged into the white ones. Testimony of Frederick S. Humphries in Geier v. University of Tennessee, Joint Appendix, Vol. V, pp. 1340-1342.

life. For example, in lower education one result has been large-scale teacher displacement, especially Black teachers, an unacceptable fallout. See, Jefferson, School Desegregation and the Black Teacher: A Search for Effective Remedies, 49 Tulane Law Review 55 (1973).

III. This Court should review the remedy (a plan merging a white and Black college) to consider whether it provides adequate safeguards to protect the affected faculty and their ability to effectively desegregate and enhance the merged TSU.

The failure to allow UT-N faculty substantial input into formulating the Merger Plan resulted in serious erosion of faculty contractual rights. For example, each UT-N teacher will be required to teach 15 semester hours (5 courses per semester) rather than the present 12 hours. This exceeds the maximum teaching load of 12 hours endorsed by the AAUP's Statement on Faculty Workload (1970).

The foregoing is but one objection the UT-N AAUP Chapter has regarding the Merger Plan.[18] Because the desegregating of Ten-

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[18] Numerous objections to the Merger Plan were brought before the State Board of Regents (TSU governing body) but were disregarded; the Board approved a new faculty handbook which was unacceptable to UT-N faculty.

nessee State University is a process,[19] amicus argues that this Court, in assessing the goal to be achieved should consider the effect of process on the rights of all parties--here the faculty. Long before Brown, this Court was sensitive to process as well as result in higher education cases; ruling that the mere admission of Blacks to a college did not achieve proper desegregation if the school erected barriers which thwarted a sound educational experience. See, McLaurin v. Oklahoma State Regents, 330 U.S. 637 (1950).

In the instant case, it is difficult for amicus, as educators, to understand how the goal of providing a sound educational experience to disadvantaged students is promoted by increasing the faculty's teaching load. Logic dictates

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[19] Until the decision in the instant case, college desegregation was viewed as a process not a result. See, Note, The Affirmative Duty to Integrate Higher Education, 79 Yale Law Journal 666 (1970).

decreasing the teaching load to allow time for intensive advising and remedial work.

In the instant case the UT-N faculty offered its own merger plan months before the final one was filed with the court, yet the merger planners summarily dismissed it even though the court ordered them to hear faculty concerns and instructed that the plan not violate any faculty member's rights.[20] Further, despite repeated requests by UT-N faculty for definite objective standards[21] in the

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[20] See, Brief of Appellants Peter Jordan, et al., Plaintiff, Intervenors. Case no. 77-1620, Geier v. University of Tennessee, U.S. Ct. of Appeals, Sixth Circuit, p. 7; certiorari denied. Peter Jordan, et al v. University of Tennessee, et al. Case no. 78-1162, April 2, 1979.

[21] Affected faculty must be appointed and assigned to consolidated schools according to "definite objective standards" of employment. Rolfe v. County Board of Education, 391 F. 2d 77 (6th Cir. 1968).

in the Merger Plan for the appointment and assignment of faculty and administrators, no such standards were adopted, and progress of the merger to date indicates an intention by TSU and Board of Regents officials to maintain TSU academic operations as they are, not to enhance them.

In short, the Merger Plan--a court ordered and approved document--has seriously imperiled the academic freedom of the UT-N faculty. Yet this Plan is the device whereby the District Court wants the State of Tennessee "to convert its white colleges and Black colleges to just colleges."[22] Amicus insists that a justly treated faculty is a necessary predicate to a "just" college and calls upon this Court to review this case in order to ascertain whether the remedy here promotes academic freedom in achieving a constitutional end.

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[22] Norris v. State Council of Higher Education for Virginia 327 F. Supp. 1368 (E.D. Va. 1971), aff'd. per curiam sub nom. Board of Visitors of the College of William and Mary v. Norris, 404 U.S. 907 (1971)

CONCLUSION

The salient issue in the instant case is whether a federal court can order a white and Black college merged in order to desegregate the latter. The UT-N AAUP Chapter has shown that resolution of this issue will have immediate and direct effect on nearly two dozen colleges and will influence the fate of the nation's over one hundred racially identifiable colleges. Amicus has argued that the merger remedy violates AAUP standards relating to faculty rights and institutional decision making. Amicus has shown that the remedy--whether affirmed by this Court or not--is defective because it lacks standards against which to measure successful desegregation.

It follows that this Court has before it a case of national importance touching vital issues of desegregation and academic freedom. Amicus respectfully asks this Court to grant the petition for certiorari sought by petitioner University of Tennessee and enter this case on its docket for plenary review.

Respectfully submitted,

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APPENDIX A

Comparative list of Public Black and white colleges in the same Metropolitan area.

	Students	Faculty
Alabama A&M U.	4500	230
U.of Alabama, Huntsville	3800	175
Alabama State U.	4150	240
Auburn U., Montgomery	3800	150
Florida A&M U.	5900	360
Florida State U.	21600	1250
Albany State College	2200	130
Albany Junior College	2000	70
Savannah State College	2500	135
Armstrong State College	3200	150
Southern U.	9000	475
Louisiana State U.	25000	1200
Jackson State U.	7900	380
Hinds Junior College	6800	290
North Carolina A&T U.	5500	350
U.of N.C., Greensboro	9900	550
Texas Southern U.	9100	390
U. of Houston	29800	1400
Norfolk State College	6800	390
Old Dominion U.	13200	660
	176850	9125

Source: Yearbook of Higher Education, 10th ed. (Chicago: Marquis, 1978), HEW, National Center for Education Statistics, Education Directory: Colleges and Universities, 1977-78 (Washington: GPO, 1978).

CERTIFICATE OF SERVICE

I hereby certify that all parties required to be served have been served and that I have mailed copies of the foregoing document to the attorneys below this 13th day of ~~June~~ August, 1979.

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